

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RUSSELL S.

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C20-5994-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an administrative law judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1965.¹ Plaintiff has at least a high school education and previously worked as sales representative medical equipment and mechanical technician. AR 30,

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 423. Plaintiff filed applications for DIB and SSI on April 4, 2018, alleging disability beginning
2 February 1, 2018.² AR 23. The applications were denied at the initial level and on reconsideration.
3 On August 28, 2019, the ALJ held a hearing and took testimony from Plaintiff and a vocational
4 expert (VE). AR 168–205. On October 30, 2019, the ALJ issued a decision finding Plaintiff not
5 disabled. AR 23–33. Plaintiff timely appealed. The Appeals Council denied Plaintiff’s request for
6 review on August 19, 2020 (AR 1–6), making the ALJ’s decision the final decision of the
7 Commissioner. Plaintiff appeals this final decision of the Commissioner to this Court.

8 **JURISDICTION**

9 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

10 **STANDARD OF REVIEW**

11 This Court’s review of the ALJ’s decision is limited to whether the decision is in
12 accordance with the law and the findings supported by substantial evidence in the record as a
13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). “Substantial evidence” means more
14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ’s
17 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
18 2002).

19 **DISCUSSION**

20 The Commissioner follows a five-step sequential evaluation process for determining
21 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000).

22
23 ² At the hearing, Plaintiff’s representative asserted that the alleged onset date should be December 1, 2015.
AR 174–75. The ALJ found the onset date to be February 1, 2018. AR 23. Plaintiff does not dispute this
finding.

1 At step one, the ALJ must determine whether the claimant is gainfully employed. The ALJ
2 found Plaintiff had not engaged in substantial gainful activity since the alleged onset date. AR 25.

3 At step two, the ALJ must determine whether a claimant suffers from a severe impairment.
4 The ALJ found Plaintiff has the following severe impairments: cervical degenerative disc disease;
5 lumbar pain with left-sided radiculopathy; bilateral carpal tunnel syndrome (CTS), status post-
6 surgeries; bilateral middle trigger fingers; osteoarthritis of left thumb; and right ulnar neuropathy.
7 AR 26. The ALJ also found that the record contained evidence of hypertension but that the
8 impairment that did not rise to the level of severe. AR 26.

9 At step three, the ALJ must determine whether a claimant's impairments meet or equal a
10 listed impairment. The ALJ found that Plaintiff's impairments did not meet or equal the criteria of
11 a listed impairment. AR 26–27.

12 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
13 residual functional capacity (RFC) and determine at step four whether the claimant has
14 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff able to perform
15 light work, as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), with the following limitations:

16 occasional climbing of ramps and stairs; never climbing ladders,
17 ropes or scaffolds; occasional stooping, kneeling, crouching, and
18 crawling; frequent bilateral handling and fingering; and frequent
exposure to extreme cold, vibrations and hazards such as heights and
machinery.

19 AR 27. With that assessment, the ALJ found Plaintiff capable of performing past relevant work as
20 a sales representative medical equipment and mechanical technician. AR 30.

21 If a claimant demonstrates an inability to perform past relevant work, or has no past
22 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
23 retains the capacity to make an adjustment to work that exists in significant levels in the national

1 economy. Although the ALJ found Plaintiff capable of performing the past relevant work
2 identified above, with the assistance of a VE, the ALJ found Plaintiff capable of performing other
3 jobs, such as a small products assembler, marker, and housekeeper. AR 32.

4 Plaintiff raises the following issues on appeal: (1) Whether the ALJ articulated sufficient
5 reasons not to include in the RFC Dr. Derek Leinenbach's limitation to sedentary work; (2)
6 whether Dr. Kimberly Wheeler's opinion established a severe mental impairment and undermined
7 substantial evidence support for the ALJ's decision; and (3) whether the ALJ provided sufficient
8 reasons to reject Plaintiff's subjective claims. Plaintiff requests remand for an award of benefits
9 or, in the alternative, remand for a *de novo* hearing. The Commissioner argues the ALJ's decision
10 has the support of substantial evidence and should be affirmed.

11 **1. Medical Opinions**

12 The regulations effective March 27, 2017, require the ALJ to articulate how persuasive the
13 ALJ finds medical opinions and to explain how the ALJ considered the supportability and
14 consistency factors.³ 20 C.F.R. §§ 404.1520c(a)–(b), 416.920c(a)–(b). The regulations require an
15 ALJ to specifically account for the legitimate factors of supportability and consistency in
16 addressing the persuasiveness of a medical opinion. The “more relevant the objective medical
17 evidence and supporting explanations presented” and the “more consistent” with evidence from
18 other sources, the more persuasive a medical opinion or prior finding. *Id.* at §§ 404.1520c(c)(1)–
19 (2), 416.920c(c)(1)–(2).

20 Further, the Court must continue to consider whether the ALJ's analysis is supported by
21 substantial evidence. *See* 42 U.S.C. § 405(g) (“The findings of the Commissioner of Social
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23 ³ The Ninth Circuit has not yet addressed the 2017 regulations in relation to its standard for the review of medical opinions. Plaintiff does not dispute that, in this case, precedential case law and the new regulations result in the same outcome. Dkt. 18, at 6.

1 Security as to any fact, if supported by substantial evidence, shall be conclusive”); *see also*
2 *Zhu v. Comm’r of Soc. Sec. Admin.*, No. 20-3180, 2021 WL 2794533, at *6 (10th Cir. July 6, 2021)
3 (applying the substantial evidence standard under the 2017 regulations). With these regulations
4 and considerations in mind, the Court proceeds to its analysis of the medical evidence in this case.

5 A. Dr. Derek J. Leinenbach, M.D.

6 Dr. Leinenbach evaluated Plaintiff for the Department of Social and Health Services
7 (DSHS) on April 26, 2018 and assessed Plaintiff with marked limitations in gross or fine motor
8 skill restrictions, significant (moderate) limitation in postural restrictions, and no significant
9 limitation in all other non-exertional areas. AR 663. Regarding exertional limitations,
10 Dr. Leinenbach limited Plaintiff to sedentary work. AR 663. Dr. Leinenbach based his limitations
11 on Plaintiff’s diagnoses of CTS, disc degenerative disorder, some decreased range of motion,
12 stenosis, and cervical spine radiculopathy to bilateral upper extremities, with right ulnar
13 neuropathy. AR 663. Dr. Leinenbach also noted Plaintiff had left carotid artery calcification and
14 chronic pain. AR 663.

15 The regulations require the ALJ to articulate the persuasiveness of each medical opinion
16 and explain how the ALJ considered the supportability and consistency factors for that opinion.
17 20 C.F.R. §§ 404.1520c(a)–(b), 416.920c(a)–(b). The ALJ found that administrative conclusions
18 for the DSHS are different than disability conclusions for the Social Security Administration and,
19 therefore, are not binding. AR 30. The ALJ further found Dr. Lenienbach’s opinion not persuasive
20 because it was given “prior to the claimant’s left CTS surgery and the opinion is inconsistent with
21 the claimant’s activities (such as moving and moving heavy objects).” AR 30. Nevertheless, the
22 ALJ stated that he accommodated Plaintiff’s symptoms associated with heavy objects in limiting
23 Plaintiff to a light level. AR 30.

1 Plaintiff argues that the ALJ gave insufficient reasons for rejecting Dr. Leinenbach's
2 limitations. Dkt. 18, at 7. Specifically, Plaintiff argues that DSHS standards for disability are the
3 same as federal standards. *Id.* Under the regulations, the ALJ may consider "other factors that may
4 tend to support or contradict a medical opinion or prior administrative finding," such as whether a
5 medical source has "an understanding of [the Social Security Administration's] disability
6 program's policies and evidentiary requirements." 20 C.F.R. §§ 404.1520c(c)(5), 416.920c(c)(5).
7 Here, the ALJ took into consideration the fact that Dr. Leinenbach provided his opinion according
8 to DSHS evaluation criteria and policy goals and not Social Security Administration law. AR 30.
9 The ALJ also correctly noted that decisions by other governmental agencies are "not binding on
10 this proceeding." AR 30 (citing 20 C.F.R. §§ 404.1504, 416.904). Therefore, Plaintiff has not
11 shown that the ALJ erred by considering this factor. Further, even if the ALJ did err by considering
12 that Dr. Leinenbach provided his opinion according to DSHS policy, this error would be harmless
13 because the ALJ did not clearly reject Dr. Leinenbach's opinion based on this factor. *See Molina*
14 *v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012), *superseded by regulation on other grounds* (an
15 ALJ's error may be deemed harmless where it is "inconsequential to the ultimate nondisability
16 determination"). Rather, the ALJ found that DSHS evaluations, although not binding, "are relevant
17 in that they contain assessments that are useful for determining the claimant's functional ability."
18 AR 30. Therefore, the ALJ's consideration of this factor was not consequential to the ALJ's non-
19 disability determination.

20 Plaintiff further argues that the ALJ erred by rejecting Dr. Leinenbach's sedentary
21 limitation based on Plaintiff's later left CTS surgery, which, Plaintiff asserts, did not drive the
22 sedentary limitation. Dkt. 18, at 8. Although the ALJ did not specify which portion of Dr.
23 Leinenbach's opinion that the ALJ found unpersuasive based on Plaintiff's later left CTS surgery,

1 it can reasonably be inferred that the ALJ rejected the doctor's assessed marked limitation
2 concerning Plaintiff's gross or fine motor skill restrictions based on the CTS surgery and not the
3 sedentary limitation. *See Magallenes*, 881 F.2d at 755 ("As a reviewing court, we are not deprived
4 of our faculties for drawing specific and legitimate inferences from the ALJ's opinion."); *see also*
5 *Molina*, 674 F.3d at 1121 ("Even when an agency 'explains its decision with "less than ideal
6 clarity," we must uphold it 'if the agency's path may reasonably be discerned.'" (internal citations
7 omitted)). Indeed, the ALJ gave other reasons for rejecting Dr. Leinenbach's sedentary limitation,
8 including finding it inconsistent with Plaintiff's daily activities, such that a reasonable inference
9 can be drawn that the ALJ did not base his rejection of Dr. Leinenbach's sedentary limitation on
10 evidence of Plaintiff's later CTS surgery. AR 30. Insofar as the ALJ rejected Dr. Leinenbach's
11 limitations regarding Plaintiff's gross or fine motor skills based on the later CTS surgery, an ALJ
12 may consider improvement with treatment in discounting a physician's opinion. *Thomas*, 278 F.3d
13 at 957. Plaintiff asserts that the CTS surgery was not effective but does not cite to evidence in the
14 record to support this assertion. Dkt. 18, at 8. Plaintiff's alternative interpretation of the evidence
15 does not deprive the ALJ's equally rational interpretation of substantial evidence. *See Morgan v.*
16 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999) ("[W]hen evidence is susceptible
17 to more than one rational interpretation, the ALJ's conclusion must be upheld."). Therefore,
18 Plaintiff has not shown that the ALJ erred by rejecting Dr. Leinenbach's limitation regarding
19 Plaintiff's manipulative activities based on evidence of Plaintiff's later left CTS surgery.

20 Plaintiff next argues that Plaintiff's activities were not inconsistent with Dr. Leinenbach's
21 limitations. Dkt. 18, at 8. Under the supportability factor, "[t]he more relevant the objective
22 medical evidence and supporting explanations presented by a medical source are to support his or
23 her medical opinion(s) . . . the more persuasive the medical opinions . . . will be." 20 C.F.R. §§

1 404.1520c(c)(1), 416.920c(c)(1). An ALJ may reject a physician’s opinion where the assessed
2 limitations are inconsistent with Plaintiff’s level of activities. *See Rollins v. Massanari*, 261 F.3d
3 853, 856 (9th Cir. 2001). Here, the ALJ found Dr. Leinenbach’s limitations inconsistent with
4 Plaintiff’s activities “such as mowing and moving heavy objects,” citing Plaintiff’s own statements
5 in his Function Report and medical treatment notes. AR 30 (citing AR 414–21, 793, 1097.) The
6 evidence, however, does not support the ALJ’s determination. Rather, Plaintiff stated in his
7 Function Report that he can use a riding mower when his father is doing yardwork but that he
8 cannot push the lawn mower. AR 416–17. Plaintiff further stated that he cannot lift more than 10
9 pounds. AR 419. Although treatment notes in April 2019 reported that Plaintiff on one occasion
10 “had to lift heavy weight because he took a load to the dump,” AR 1097, the notation does not
11 identify the amount of “heavy weight” that Plaintiff lifted on that occasion nor does it support a
12 finding that Plaintiff can “frequent[ly]” lift or carry objects weighing up to 10 pounds consistent
13 with “light work” and inconsistent with Dr. Leinenbach’s sedentary limitation. *See* 20 C.F.R. §§
14 404.1567(b), 416.967(b) (defining “light work”); *see also Fair v. Bowen*, 885 F.2d 597, 603 (9th
15 Cir. 1989) (the ALJ may discount a claimant’s pain testimony where the “claimant is able to spend
16 a substantial part of his day engaged in pursuits involving the performance of physical functions
17 that *are* transferable to a work setting” (emphasis in original)). Therefore, the ALJ did not
18 reasonably find Dr. Leinenbach’s sedentary limitation to be unpersuasive based inconsistencies
19 with evidence of Plaintiff’s activities.

20 Finally, Plaintiff argues that the ALJ erred by finding the opinions of medical consultants
21 Drs. Noman Staley, M.D., and Dennis Koukol, M.D., “more persuasive [than Dr. Leinenbach’s
22 opinion] and consistent with the longitudinal record.” AR 30. Drs. Staley and Koukol assessed that
23 Plaintiff had the ability to perform activities consistent with light work. AR 213, 223. Plaintiff

1 asserts that, contrary to the ALJ's finding that Drs. Staley and Koukol's opinions were more
2 consistent with the longitudinal record, "the long term record showed ongoing deficits and poor
3 prognosis." Dkt. 18, at 9. "The ALJ is responsible for resolving conflicts in the medical record."
4 *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008); SSR 96-8p ("If
5 the RFC assessment conflicts with an opinion from a medical source, the adjudicator must explain
6 why the opinion was not adopted."). The ALJ found that Drs. Staley and Koukol's opinions "are
7 generally consistent with the objective medical evidence" and that "[p]hysical examination reports
8 document some left upper extremity abnormalities like reduced strength, range of motion, and
9 trigger finger but otherwise normal strength, sensation, gait, and neck range of motion." AR 30.
10 Plaintiff cites treatment notes from PA Matthew Renner dated February 8, 2019,⁴ which Plaintiff
11 asserts supports Dr. Leinenbach's sedentary limitation. Dkt. 18, at 10 (citing AR 155). Plaintiff
12 offers an alternative interpretation of the evidence; however, the ALJ's interpretation was at least
13 as rational, and, therefore, the Court must uphold that decision. *Thomas*, 278 F.3d at 954.
14 Therefore, the ALJ reasonably found Drs. Staley and Koukol's opinions regarding Plaintiff's
15 exertional limitations more persuasive than Dr. Leinenbach's sedentary limitation, and the ALJ's
16 finding was supported by substantial evidence.

17 Although the ALJ's rejection of Dr. Leinenbach's sedentary limitation on grounds that it
18 was inconsistent with evidence of Plaintiff's activities was not supported by substantial evidence,
19 as described above, this error was harmless because the ALJ reasonably found Dr. Leinenbach's
20 limitations less persuasive than conflicting limitations assessed by Drs. Staley and Koukol. *Molina*,
21 674 F.3d at 1115 (harmless error where the ALJ's error was inconsequential to the ALJ's ultimate
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23 ⁴ Plaintiff asserts that PA Renner's findings are additional evidence considered by the Appeals Council.
Dkt. 18, at 9–10. This evidence, however, is a copy of evidence that was in the record and, therefore, was
considered by the ALJ. See AR 2, 199.

1 disability determination). Nevertheless, because this matter is remanded on other grounds as
2 described below, the ALJ should reconsider Dr. Leinenbach's assessed limitations as warranted
3 by further consideration of the evidence on remand.

4 **2. New Evidence**

5 Plaintiff argues that the ALJ's decision must be remanded or the Court should award
6 benefits in light of new evidence submitted to the Appeal's Council. Dkt. 18, at 11–14.
7 Specifically, Plaintiff argues that a January 2019 opinion of Dr. Kimberly Wheeler, Ph.D.,
8 establishes the existence of a severe mental impairment that undermines the RFC and precludes
9 regular and continuing work. *Id.* (citing AR 45–50).

10 “[I]n determining whether to remand a case in light of new evidence, the court examines
11 both whether the new evidence is material to a disability determination and whether a claimant has
12 shown good cause for having failed to present the new evidence to the ALJ earlier.” *Mayes v.*
13 *Massanari*, 276 F.3d 453, 462 (9th Cir. 2001). However, because this matter is remanded on other
14 grounds as described below, the Court need not evaluate whether additional evidence of Dr.
15 Wheeler's opinion provides a separate basis for remand. On remand, the ALJ must consider
16 evidence that is part of the administrative record. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041
17 (9th Cir. 2008) (“The ALJ must consider all medical opinion evidence.”).

18 **3. Subjective Testimony**

19 Plaintiff contends that the ALJ improperly evaluated Plaintiff's testimony. The rejection of
20 a claimant's subjective symptom testimony⁵ requires the provision of specific, clear, and
21 convincing reasons. *Burrell v. Colvin*, 775 F.3d 1133, 1136–37 (9th Cir. 2014); *see also*

23 ⁵ Effective March 28, 2016, the Social Security Administration eliminated the term “credibility” from its policy and clarified the evaluation of a claimant's subjective symptoms is not an examination of character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term credibility.

1 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “General findings are insufficient;
2 rather, the ALJ must identify what testimony is not credible and what evidence undermines the
3 claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996). An ALJ may reject a
4 claimant’s symptom testimony when it is contradicted by the medical evidence, but not when it
5 merely lacks support in the medical evidence. *See Carmickle*, 533 F.3d at 1161 (“Contradiction
6 with the medical record is a sufficient basis for rejecting a claimant’s subjective
7 testimony.”); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“[L]ack of medical evidence
8 cannot form the sole basis for discounting pain testimony.”).

9 Plaintiff alleges that he is unable to stand, walk, sit, maintain balance for any length of
10 time, perform duties safely, or maintain grasp in both hands, that he experiences tremendous pain
11 in his neck and shoulders, that his back left leg buckles, and that he experiences numbness in his
12 upper extremities, lower left leg, and small of back. AR 414–21. Plaintiff alleges other limitations,
13 including limits in his ability to lift, squat, bend, reach, kneel, climb stairs, and see. AR 419.
14 Plaintiff further alleges that his symptoms result in falls and limit his ability to lift more than 10
15 pounds and that he has difficulties with completing tasks, concentration, and getting along with
16 others. AR 419. The ALJ found that Plaintiff’s “medically determinable impairments could
17 reasonably be expected to cause the alleged symptoms; however, the claimant’s statements
18 concerning the intensity, persistence and limiting effects of these symptoms are not entirely
19 consistent with the medical evidence and other evidence in the record.” AR 28.

20 Plaintiff argues that the ALJ failed to provide sufficient reasons for discounting Plaintiff’s
21 testimony.⁶ Dkt. 18, 14–16. Specifically, Plaintiff argues that the objective medical evidence

22 ⁶ Plaintiff also notes that “[t]he ALJ cited inconsistent statements about DAA [Drug Addiction and
23 Alcoholism]” but does not identify a specific error in the ALJ’s evaluation of Plaintiff’s statements. Dkt. 18,
at 16. Accordingly, the Court declines to address this argument for lack of specificity. *See Carmickle*, 533
F.3d at 1161 n.2 (declining to address issues not argued with any specificity); *see also Paladin Assocs., Inc.*

1 supports limiting Plaintiff to sedentary work. *Id.* at 15. An ALJ may reject subjective testimony
2 upon finding it contradicted by or inconsistent with the medical record. *Carmickle*, 533 F.3d at
3 1161. Here, the ALJ recited evidence in the record that showed that Plaintiff had a “history of
4 chronic neck and back pain,” showed “degenerative changes and spondylosis” of the cervical
5 spine, “demonstrated limited cervical range of motion, but also negative straight leg rise” and
6 “intact lower extremity sensation,” and also showed a full neck range of motion “[d]espite his neck
7 pain and positive Spurling’s test.” AR 28. The ALJ further cited medical records that noted
8 Plaintiff “reported left leg weakness and [Plaintiff] was assessed with lumbar pain with left-sided
9 radiculopathy” and that Plaintiff “reported worsening left leg pain and weakness” in September
10 2019. AR 28–29. The objective medical evidence is not reasonably inconsistent with Plaintiff’s
11 testimony; rather, the evidence cited by the ALJ supports Plaintiff’s testimony by showing that
12 Plaintiff had limited range of motion in his neck, full range of motion with pain, and received a
13 positive Spurling’s test result. AR 28. Further, the evidence shows that Plaintiff has consistently
14 reported back pain and left-leg pain and weakness. AR 28–29. Therefore, the ALJ did not
15 reasonably discount Plaintiff’s testimony of debilitating pain from his spine impairments based on
16 inconsistencies with the medical evidence.

17 Plaintiff further argues that the ALJ erred by discounting Plaintiff’s testimony based on
18 inconsistencies with Plaintiff’s daily activities. An ALJ may consider daily activities in evaluating
19 a claimant’s testimony regarding his physical limitations and the severity of his symptoms. *Fair*,
20 885 F.2d at 603 (“[I]f a claimant is able to spend a substantial part of his day engaged in pursuits
21 involving the performance of physical functions that *are* transferable to a work setting, a specific
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23 *v. Mont. Power Co.*, 328 F.3d 1145, 1164 (9th Cir. 2003) (the court “ordinarily will not consider matters on appeal that are not specifically and distinctly argued in an appellant’s opening brief”).

1 finding as to this fact may be sufficient to discredit an allegation of disabling pain.” (emphasis in
2 original)). Here, the ALJ found that Plaintiff reported “doing an array of daily activities, including
3 riding a lawn mower; walking, driving, and using public transportation to get around; attending
4 Bible study; and going to the store” and that Plaintiff reported in August 2019 “that he lifted heavy
5 weight when he took a load to the dump.” AR 29. Plaintiff argues that these daily activities do not
6 show that Plaintiff is capable of performing “robust activities beyond the sedentary work range.”
7 Dkt. 18, at 16. The Court agrees. The evidence of daily activities cited by the ALJ is not clearly
8 inconsistent with Plaintiff’s testimony nor does it clearly evidence Plaintiff’s ability to perform
9 the physical exertion requirements of “light work.” *See* 20 C.F.R. §§ 404.1567(b), 416.967(b)
10 (involving, among other, lifting up to 20 pounds, “frequent” lifting or carrying objects up to 10
11 pounds, “a good deal of walking or standing” and “with some pushing and pulling of arms or leg
12 controls”). Rather, much of Plaintiff’s daily activities involve sitting or low exertional activities
13 and are not clearly transferable to a work setting. Similarly, as described above, Plaintiff’s report
14 that he had to carry “heavy weight” on at least one occasion does not clearly support the ALJ’s
15 finding that Plaintiff has “physical abilities great than purported,” AR 29, considering that the
16 amount of “heavy weight” was not specified and Plaintiff testified that the activity subsequently
17 caused him pain. AR 29, 190. *See Fair*, 885 F.3d at 603 ([T]he Social Security Act does not require
18 that claimants be utterly incapacitated to be eligible for benefits”). Therefore, the ALJ’s did
19 not reasonably discount Plaintiff’s testimony of debilitating pain from his spine impairments based
20 on inconsistencies with evidence of Plaintiff’s daily activities.

21 The Commissioner argues that Plaintiff was given conservative treatment in the form of
22 medication; however, this was not a reason cited by the ALJ for discounting Plaintiff’s testimony
23 regarding his debilitating pain from his spinal impairments. *See Bray v. Comm’r of Soc. Sec.*, 554

1 F.3d 1219, 1226 (9th Cir. 2009) (the Court must “review the ALJ’s decision based on the reasoning
2 and factual findings offered by the ALJ”). Even if the ALJ had rejected Plaintiff’s testimony on
3 account of receiving “conservative” treatment, the evidence does not support this finding as
4 Plaintiff underwent lumbar epidural steroid injections, which treatments are not properly
5 characterized as “conservative.” *See Garrison v. Colvin*, 759 F.3d 995, 1015 n.20 (9th Cir. 2014).

6 For these reasons, the ALJ did not provide specific, clear, or convincing reasons for
7 discounting Plaintiff’s testimony regarding debilitating pain from his spine impairments. This error
8 was harmful because it resulted in an RFC assessment that did not account for all of Plaintiff’s
9 limitations.

10 **4. Arguments Raised in Reply**

11 Plaintiff also argues in his Reply Brief that the ALJ’s decision was constitutionally
12 defective, warranting remand, because the appointment of Andrew Saul was unconstitutional.
13 Dkt. 23, at 1–4. Because Plaintiff raises this argument for the first time in his Reply, Plaintiff has
14 waived this argument. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009)
15 (“[A]rguments not raised by a party in an opening brief are waived.”). Further, because this matter
16 is remanded on other grounds as described herein, the Court need not address the merits of
17 Plaintiff’s argument.

18 **CONCLUSION**

19 For the reasons set forth above, this matter is REVERSED and REMANDED for further
20 administrative proceedings.

21 DATED this 5th day of November, 2021.

22 
23 MARY ALICE THEILER
United States Magistrate Judge